"The mere fact that he might have found out fraud if he had been more vigilant, and had made further enquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him."

In our instant case, there is no evidence on record indicating that the plaintiff had or should have suspected anything fishy thereby saddling him with the obligation to inquire.

Bagher Singh v. *Chanan Singh & Anor.*[6] was a case on section 42 of F.M.S. Land Code 1928 (Cap. 138). There it was held that a transferee would not have his title defeated where he was not a party to the fraud of the transferor who had deliberately transferred the land for value to defeat his (the transferor's) creditors. In my view, the same principle holds good in our instant case.

Moreover, quite apart from the element of fraud, the allegation of the defendants, that the plaintiff bought the land from the administrator (as opposed to Ting Siong Hung) and that the administrator transferred the land to him (in paragraph 9 of their affidavit made on February 18, 1984), is not supported by the documentary evidence Exh. "A" and Exh. "C" annexed to the plaintiff's affidavit affirmed on November 9, 1983 and runs counter to their own evidence in paragraph 6 of their said affidavit. In fact the said Exh. "A" and Exh. "C" substantiated the plaintiff's assertion that he bought it from Ting Siong Hung. The fact that the defendants have instituted an action (Suit No. 63 of 1983) claiming, *inter alia*, for the revocation or rescission of the transfer of the assets of the deceased's estate is only one of the factors to be considered. The weight to be attached thereto must be assessed in the light of all the contentions and evidence of the defendants against the plaintiff respecting which I have already referred. The plaintiff in this case was made the 3rd defendant in Civil Suit No. 63 of 1983 instituted by the defendants. Although the indorsements in the Writ of Summons in the said Suit claim, *inter alia*, for revocation or rescission of transfer of the deceased's estate by Ting Ting Giong as administrator and by the plaintiff as the 3rd defendant and two other co-defendants "for conspiracy and fraud," all that was alleged against the plaintiff was no more than that the plaintiff was a neighbour of the defendant's family who knew that the property he purchased was one of the estates of the deceased. There is no allegation of fraud against the plaintiff in the Statement of Claim in the said Suit. In fact the defendants themselves asserted in the Statement of Claim that Ting Siong Hung transferred the land to the plaintiff for $15,000/-. (See Exh. "A" annexed to Teo Chong Lee's affidavit affirmed on April 24, 1984 particularly indorsement (b) in the Writ of Summons and paragraph 4 of the Statement of Claim).

Section 134(2) of the Land Code provides:

"Nothing in this Code shall be so construed as to place in doubt the title of any person who is a purchaser in good faith and for value of any interest, and who is registered as the proprietor of such interest, on the ground that the registered proprietor through or under whom he claims was registered as proprietor through fraud or error, whether such fraud or error consisted in a misdescription of the land or otherwise."

On the evidence and the materials before me, I am not satisfied that as against the plaintiff there is a serious question to be tried. The application is allowed with costs to the plaintiff. There shall be an order that the caveat lodged by the defendants against the land and registered in the Sibu Land Registry Office as Sibu Instrument No. L.2300/1983 on May 26, 1983 be forthwith removed.

Application allowed.

Solicitors: *Battenberg & Talma; Teo & Co.*

PUBLIC PROSECUTOR v. PETER TING CHIONG KING

[A.Cr. J. (Chong Siew Fai J.) November 10, 1984]

[Sibu – Criminal Appeal No. 23 of 1982]

Criminal Law and Procedure – Sentence – Whether sentences of whipping can be concurrent – Criminal Procedure Code (F.M.S. Cap. 6), ss. 282(d) & 292(i).

In Criminal Case No. 16 of 1982, the respondent Peter Ting Chiong King was convicted of robbery and was sentenced, *inter alia*, to 5 strokes of the rattan. In another Criminal Case No. 17 of 1982 arising from which the present appeal is brought, the respondent was again convicted of another offence of the same nature and was sentenced, *inter alia*, to 5 strokes of the rattan. The learned President of the Sessions Court ordered that the 2 sentences of whipping should run concurrently. The Public Prosecutor appealed contending that the sentences of whipping could not be concurrent and that it was wrong to so order.

Held: to order concurrent sentences of whipping in the light of the authorities cited is to impose a heavier punishment through a mode of execution not legally provided. It is unauthorised by law. The order of concurrent whipping for the two sentences is set aside. On the facts of the present case the number of strokes is reduced to 2 but the sentence of 5 years' imprisonment was to remain.

Cases referred to:

(1) *Emperor* v. *Veerappa* A.I.R. 1937 Rangoon 310.
(2) *Emperor* v. *Yenkataswamy* A.I.R. 1937 Rangoon 286.

CRIMINAL APPEAL.

Nik Hashim bin Nik Abdul Rahman (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Cur. Adv. Vult.

Chong Siew Fai J. : This is an appeal by the prosecution against the sentence of whipping imposed on the appellant being made concurrent with the whipping sentence passed in another case also involving the appellant.

So far as is relevant to the instant appeal, the facts are briefly as follows. In Sibu Sessions Court Criminal Case No. 16/82 the appellant was convicted on his own plea of guilty of the offence of robbery by using a deadly weapon, a dagger and was sentenced, *inter alia*, to 5 strokes of the rattan. In another Criminal Case No. 17/82 arising from which the present appeal is brought, the appellant was again convicted of another offence of the same nature on his own plea of guilty and was sentenced, *inter alia*, to 5 strokes of the rattan. This is what the learned trial President said in his judgment:

"The offender is sentenced to five (5) years' imprisonment and with 5 strokes of the rattan. The sentence is to take effect from today. The substantive sentence (imprisonment) can be concurrent and there is no reason why additional sentence (whipping) cannot be concurrent (see *e.g.* section 282(d) and section 292(i) C.P.C.).

Such sentence is legal and that is all that matters. A good and practiced canon of construction is that where, as here, there is an ambiguity or doubt, such ambiguity or doubt should, as here, be resolved in favour of the accused, until Parliament expressly says otherwise."

It may be noted that the above judgment contains no express and identifiable order that the sentence of whipping is to be concurrent with that imposed in Criminal Case No. 16/82 though this was apparently accepted by the prosecution to be the position. However, that the learned trial President intended the sentences of whipping in those two cases to be concurrent is obvious from his remark in Criminal Case No. 18/82 in which the appellant is also the accused. In Case No. 18/82, the appellant was convicted of the offence of voluntarily causing hurt while committing robbery and was sentenced to 5 years' imprisonment. With an obvious reference to Case No. 17/82, the learned trial President said in his judgment:

"The Deputy Public Prosecutor said the rattan can't be concurrent. It is concurrent." (See Case 17/82).

The complaint of the learned Deputy Public Prosecutor is that a sentence of whipping cannot be made concurrent and that it was wrong to so order. I have not been able to find any cases decided by court in our country on this issue. However, in *Emperor* v. *Veerappa*(1) the accused was convicted of two offences in two separate cases. For each offence he was sentenced to 20 lashes, but the two sentences of whipping were ordered to run concurrently. The judgment at page 311 reads:

"..... and the position is no better if they (double sentences of whipping) are ordered to run concurrently because sentences of whipping cannot run concurrently.

As pointed out by Twomey J., in 6 L.B.R. 22 (*Emperor* v. *Eng Gyaung* 12 Cr.L.J. 465) the word 'concurrent' properly applies only to sentences of imprisonment. If it were applied to sentences of whipping the literal meaning would be that the prisoner was to be flogged by two operators simultaneously."

See also *Emperor* v. *Yenkataswamy*(2) where the same judge again expressed the same view. I am inclined to agree with the construction on the concurrent sentences of whipping in those cases.

More recent Indian or English authorities on the issue appear to be lacking. This, however, may not be surprising since the sentence of whipping was abolished in England in 1948 and in India in 1955.

The learned trial President said in his judgment that the substantive sentence (imprisonment) could be concurrent and there was no reason why the additional sentence (whipping) could not be concurrent. He referred to section 282(d) and section 292(i) of the Criminal Procedure Code. Section 292(i) allows a second sentence of imprisonment imposed in a subsequent trial of an offence to run either immediately or at the expiration of the

imprisonment term imposed in an early trial of the same accused on another offence as the court may direct. It has no application to sentences of whipping. Similarly, section 282(d) of the Criminal Procedure Code deals with sentences of imprisonment and not sentence of whipping.

To order concurrent sentences of whipping as understood in the light of the authorities cited above is to impose a heavier punishment through a mode of execution not legally provided. In any event, it is, in my view, unauthorised by law.

For the above reasons the order of concurrent execution of the 5 strokes of the rattan together with those ordered in Case No. 16/82 is set aside.

The learned trial President considered it fit that the sentence of whipping should be imposed. I do not propose to interfere with that. However, it is difficult to assess how many strokes would have been imposed had the concurrent order not been erroneously made. It seems, from the judgment of the learned trial President, that he did not intend that 5 strokes of the rattan were to be separately and physically inflicted in this Case No. 17/82 in addition to the 5 strokes ordered in Case No. 16/82. Indeed, it might be argued that in all no more than 5 strokes were, in effect, intended to be physically inflicted for both cases. In the particular circumtances of this case, I consider it fair and reasonable that the sentence of whipping be reduced by 3 strokes *i.e.* from 5 strokes to 2 strokes. And I so order. The sentence of 5 years' imprisonment running from August 2, 1982 is, of course, to remain.

Order accordingly.

RE WALTER SU

EX PARTE UNITED MALAYAN BANKING CORPN. BHD.

[O.C.J. (Mohamed Dzaiddin J.) April 30, November 24 & December 28, 1984]

[Penang – In Bankruptcy No. 347 of 1983]

Debtor and Creditor – Petition for Receiving Order – Notice of Intention to Oppose – Whether Bankruptcy Notice was properly issued and reliance of act of bankruptcy by creditor valid – Bankruptcy Act 1967, s. 6(4).

Bankruptcy – Whether Bankruptcy Notice was properly issued and reliance of act of bankruptcy by creditor valid.

This was a Notice of Intention filed by the debtor on September 25, 1984 to oppose the creditor's petition for a Receiving Order. The debtor challenged, *inter alia*, the validity of the Bankruptcy Notice issued on October 20, 1983 and the act of bankruptcy relied on by the creditor in the petition, and had asked that this petition be dismissed or stayed on the ground that an appeal was pending against the summary judgment of the learned Registrar. The Bankruptcy Notice issued was in respect of this judgment sum and the act of bankruptcy relied upon by the judgment creditor was his failure to comply with the requirement of the Bankruptcy Notice.

Held, dismissing the application: (1) the Court had a discretion to allow an extension of time to serve the Bankruptcy Notice even though such application was made after the expiration of one month from the issue thereof;

(2) the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition. The Court of Bankruptcy will not, as a matter of course, enquire into the validity of a judgment debt, but only when there is evidence that a judgment had been obtained by fraud or collusion, or that there has been some miscarriage of justice;

(3) in the present case, no sufficient reason has been shown by the debtor to enable the Court to exercise its discretion in favour of a stay. A Receiving and Adjudication Order would be made against the debtor.

[*Editorial Note:* The judgment debtor appealed against the decision of Mohamed Dzaiddin J. The Supreme Court (Abdul Hamid C.J. (Malaya), Mohamed Azmi and Syed Agil Barakbah S.C.JJ.) in Supreme Court Civil Appeal No. 34 of 1985 on November 20, 1985 upheld the judgment of the learned Judge.]

Cases referred to:

(1) *Re Robert Chuah Koh Hoay ex parte Hwang & Yusoff Securities Sdn. Bhd. (Unreported)* (Bankruptcy No. 205 of 1983, Judgment of Mohamed Dzaiddin J.).
(2) *Re French Ex parte French* (1889) 6 Mor. 258; 24 Q.B.D. 63, C.A.
(3) *In re Noble (A Bankrupt)* [1965] 1 Ch. 129.
(4) *In re Flatau. Ex parte Scotch Whisky Distillers* (1889) 22 Q.B.D. 83.
(5) *In re Saville* (1887) 4 Mor. 277, 279; 3 T.L.R. 791.

IN BANKRUPTCY.

Subash Chandran for the judgment debtor.

Leow Soon Ch'ng (Miss) for the judgment creditor.

Madan Mohan Lall (Asst. Official Assignee) also appearing.

Cur. Adv. Vult.